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No. 87-570

IN THE

Supreme Court of the United States

October Term, 1987

NICHOLAS COLAFELLA, K. LEROY IRVIS, JAMES J. MANDERINO, MATTHEW J. RYAN, AND THE BIPARTISAN COMMITTEE FOR THE ADMINISTRATION OF THE HOUSE OF REPRESENTATIVES,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF OF PETITIONERS

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ARGUMENT

The importance of the issue that petitioners request the Court to review is ignored by the government. It is beyond dispute that petitioners consider the issue to be of crucial importance to their constituents, the citizens of the Commonwealth of Pennsylvania. The *amicus curiae* briefs underscore the importance of the issue to legislatures across the country. The National Conference of State Legislatures and the Council of State Governments, representing the legislatures of each of the States and American Territories, filed an *amicus curiae* brief on behalf of their members. Eleven other states or legislatures considered the issue to be of such importance as to file their own brief in addition to that filed by the National Conference on their behalf.[1]

The importance of the privilege to state legislatures and, derivatively, to their constituents justifies review of this case by the Court. Although there may be no reported cases on this precise issue, the need for the issue to be decided by this Court is no less crucial. Petitioners are informed that a number of legislatures across the country have been subpoenaed by federal grand juries. If the decision of the court of appeals is allowed to stand, state legislators can expect a proliferation of federal grand jury subpoenas, with the ensuing distraction, interference and expense of dealing with the subpoenas.

Petitioners have expended great time, money and effort on behalf of Pennsylvania citizens in seeking to uphold the privilege protecting the state legislators from interference and disruption. It is inconceivable how the government can suggest that in order for this Court to review this issue, other legislatures should also spend public monies to litigate the matter in the future. The expenditure of these monies and efforts will be obviated by a

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1. The decision to file an *amicus* brief generally requires an affirmative vote of a legislative committee or the legislature itself. Accordingly, the importance of this issue to the *amici* and their constituents is established by the commitment of considerable time and money in supporting petitioners' position.

final determination by this Court now as to the existence and scope of the privilege.

1. Without citation to authority, the government asserts that the court of appeals' decision "constitutes only an abstract treatment of legal principles" and is interlocutory in nature. Brief for the United States in Opposition ("Brief") at 6. This assertion is unfounded. Even the government recognizes in its own Brief that the issue of the existence of the privilege was decided, stating at page 6: "the court of appeals correctly concluded that state legislators are not entitled to assert a privilege based on the privilege enjoyed by Members of Congress under the federal Speech or Debate Clause." (Footnote omitted). Both of these inconsistent assertions cannot be correct.

The issue squarely before this Court and the court of appeals is and was whether members of an investigative committee of a state legislature, who are not themselves targets of a federal criminal investigation, may resist a federal grand jury subpoena for their investigative documents and reports served during an ongoing legislative investigation. Petitioners argued in the court of appeals, and they argue in this Court, that a legislative privilege based on the considerations supporting the Speech or Debate Clause protects state legislators from forced disclosure of documents to a federal grand jury. The court of appeals specifically rejected petitioners' argument, stating:

> Our survey of the suggested rationales for the speech or debate privilege for members of Congress convinces us that after *Gillock* even a qualified speech or debate privilege for state legislators would not realistically serve the purposes that the Speech or Debate Clause is intended to advance. Neither the threat of harassment, the dangers of distraction, nor the potential disruption of confidential communications justifies a qualified privilege for the full range of legislative activities normally protected by the Speech or Debate Clause. We therefore refuse to recognize such a privilege; hence we reject the underlying rationale for the district court's decision.

Pet. App. 21a.

Although the court of appeals alluded to "the possibility of a more narrowly tailored privilege for confidential deliberative communications," Pet. App. 21a, the court specifically stated that it did not hold that a deliberative process privilege protects state legislators. Pet. App. 23a. The government simply misstates the ruling of the court when it asserts at page 5 of its Brief that the court "remanded the case for further proceedings to determine whether any or all of the subpoenaed materials are protected from disclosure under a privilege for confidential deliberative communications." In fact, the court specifically stated that it is not recognizing a confidential deliberation privilege.

The issue before the court was whether a privilege exists, and the court specifically "reject[ed] a qualified speech or debate privilege." Pet. App. 21a. This was a final decision. There can be no doubt that under the court of appeals' decision petitioners will be required to produce documents commanded by the subpoena.

2. At pages 7-8 of its Brief, the government suggests that petitioners and *amici* exaggerate the potential burden of grand jury subpoenas on state legislative committees. But the government misses the mark. The same potential for abuses that supports protection for federal legislators must also support application of the privilege to state legislators. Also, petitioners and *amici* are concerned with the significant distraction and interference of complying with a subpoena as well as moving to quash or limit a subpoena under Rule 17, Fed. R. Crim. P. It is not enough to state that the subpoenaed party may move to quash unreasonable subpoenas. The very real danger lies in the disruption caused by forcing a subpoenaed legislator to take *any* action in response to a subpoena.

3. The government's attempts to distinguish *Star Distributors, Ltd. v. Marino*, 613 F.2d 4 (2d Cir. 1980), and *In re Hampers*, 651 F.2d 19 (1st Cir. 1981), are specious. The decision of the court below irreconcilably conflicts with these decisions. *Hampers* involved the request of a federal grand jury for documents in aid of a criminal prosecution. The court in *Hampers* did not give the government *carte blanche* to obtain all

requested records. Rather, recognizing the "value of preserving . . . the postures of comity and deference arising from federalism," *id.* at 23, the court rejected the government's argument that it should have unfettered access to the requested documents.

Star Distributors is even more applicable, in that the court stated that "state legislators must be accorded a privilege similar to that of federal legislators." *Id.* at 9. Contrary to the government's assertions, *United States v. Gillock*, 445 U.S. 360 (1980), does not compel a contrary conclusion, except in the peculiar situation before the Court in *Gillock*. In that case, a legislator who was the target of a federal criminal investigation attempted to use the speech or debate privilege to avoid criminal liability. In a case in which a state legislator is not the target of a federal criminal investigation, the Third Circuit's refusal to hold that a privilege protecting federal legislators does not protect state legislators directly contradicts *Star Distributors*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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